

TOWN OF TIVERTON
ZONING BOARD OF REVIEW
MINUTES

WEDNESDAY, July 2, 2008
7:30 P.M.

The following petitions were received and were heard by the Tiverton Zoning Board of Review on Wednesday, July 2, 2008 at 7:30 p.m. at the Tiverton Town Hall, 343 Highland Road.

Members present: Chairman David Collins, Jay Jackson, Richard Taylor, Lise Gescheidt, Susan Krumholz, and Raymond Lafazia (alternate).

Also present were: Peter Ruggiero, Town Solicitor, Sally Ferreira, Court Reporter and Gareth Eames, Building/Zoning Official.

1. A petition has been filed by the Tiverton Yacht Club, 58 Riverside Drive appealing a decision of the Tiverton Building/Zoning Official to issue a Notice of Violation dated March 12, 2008 to remove the toilet/bath trailer parked on the property located at 58 Riverside Drive, Tiverton, RI being Map 6-5 Block 70 Card 5 on Tiverton Tax Assessor's maps located in a R40 zoning district.

(Chairman David Collins recused himself and Vice Chairman Jay Jackson conducted the proceedings)

DECISION: Kenneth Tremblay, attorney for the Tiverton Yacht Club along with Wayne Karzenski a member of the Tiverton Yacht Club who was sworn in came before the Board to present their case. Mr. David Campbell an attorney and also an abutter asked to be heard on a jurisdictional issue before testimony was given. Vice Chairman Jay Jackson allowed Mr. Campbell to proceed.

Mr. Campbell stated it was his contention that this Zoning Board does not have subject matter jurisdiction to hear this matter and does not have the authority to review and potentially reverse a court order. Mr. Campbell went on to say the Board can either deny the appeal and let the Newport County Superior Court sort out the Building Official's order as it relates to what the Superior Court did or the Board can return it to the Superior Court and say they made no findings that anything else in his opinion would be a nullity.

Mr. Tremblay responded by stating the Board last year upheld the Building Official's decision that the Yacht Club could have this temporary structure because it was necessary for the operation of the swimming pool and the Public Health and Safety Department requires it. The Morans then appealed that decision and that appeal is pending in Superior Court. Mr. Tremblay went on to say separate and apart from that there was an issue about the expansion of a nonconforming use and the judge said the footprint of the building is too big. Mr. Tremblay informed the Board the Yacht Club has a new plan that's being reviewed by the Building Official for a smaller building.

Mr. Tremblay stated the Yacht Club is appealing the Building Official's letter of March 12th because there is no zoning violations cited in that letter. Mr. Tremblay went on to summarize what happened in court regarding this matter.

Mr. Ruggiero, town solicitor, made the recommendation that the Board hear this case and proceed and advised the Board the only issue before the Board this evening is the Building Official's Notice of Violation. Mr. Ruggiero went on to remind the Board when it sits in appeal on the Building Official's decision, the Board may affirm or reverse, may modify the order requirement, decision or determination appealed from and may make any order, requirement, decision or determination as ought to be made and to that end the Board shall have all the powers of the zoning official from which the appeal was taken. Mr. Ruggiero stated if anyone believes that the Board's decision is out of bounds and beyond their authority, there is a remedy later on.

Mr. Tremblay called Gareth Eames, the Building/Zoning Official and Cheryl Padilla a member of the Tiverton Yacht Club as witnesses who gave testimony. Mr. Eames gave extensive testimony and Mr. Campbell cross-examined.

John Moran, Jr., of 46 Riverside Drive stated the toilet trailer from his perspective is an eye soar and fowl smelling at times depending on the wind's direction. Mr. Moran went on to say the trailer has been on the property for several years. Mr. Moran also stated this trailer is there to serve a commercial pool in a residential district. Mr. Moran submitted some pictures of the trailer. The Vice Chairman marked Mr. Moran's documents as Exhibit 1.

Renee Jones of 161 Highland Road a member of the Tiverton Yacht Club was sworn in and stated because of several concerns raised by the abutters several years ago to the Department of Health, the Tiverton Yacht Club was required to have running water and flushing toilets to keep the pool open. Ms. Jones went on to say the reason this temporary trailer is still on the premises is because the Yacht Club does not have a building permit for the clubhouse and as soon as the clubhouse is built, this trailer will no longer be needed.

In summary, Mr. Campbell stated the Yacht Club has a legal right to exist but they don't have a right to exist illegally and he asked the Board to enforce the zoning ordinance. Mr. Tremblay in summary stated there is another set of building plans in front of the building inspector. Mr. Tremblay also stated the judge doesn't want to shut down the use of the trailer for public health reasons.

The Board went into executive session and discussed the petition. Ms. Gescheidt made a motion to reverse the Building Official's Notice of Violation on the grounds that from the Court's opinion that a continuous seasonal use of these premises with a clubhouse that matches the original footprint would be a permitted contingent nonconforming use, that the use of the pool continues despite the fact that the building permit has been in limbo during this period of time but the guidance of the Court indicates that as long as it's confined to the original footprint that this would be permissible. And so given the fact that the use of the pool would be an ancillary use of that land and that toilet facilities would be necessitated by health and welfare concerns as well as the rulings from the Department of Health, those would be her thoughts in reversing the building

inspector and allowing this to be considered a temporary necessary facility. And given the fact the Superior Court has not found it necessary to prohibit the continued use of the toilet trailer that that is additional guidance to the Board in coming to a factual and legal conclusion. Mr. Lafazia seconded. The vote was unanimous. Voting in favor were: Vice Chairman Jay Jackson, Ms. Gescheidt, Mr. Taylor, Mr. Lafazia and Ms. Krumholz.

2. A petition has been filed by Constance Lima, President of Tiverton Land Trust requesting a variance to Article IV Section 10.a. & 10.g. of the Tiverton Zoning Ordinance in order to hold annually a Farmer's Market having retail sales of fresh goods, produce and plant material at 3228 Main Road, Tiverton, RI being Map 2-5; 2-6 Block 119 Card 2 on Tiverton Tax Assessor's Maps which use is not currently allowed in an Open Space zoning district.

DECISION: Chairman David Collins began this petition by explaining that the Zoning Board had concerns about hearing this petition because of some possible conflicts. The Chairman asked Mr. Taylor to explain the issue and how it was resolved for the record. Mr. Taylor went on to explain that he is a member of the Tiverton Land Trust and has donated to the Tiverton Land Trust so he recused himself from hearing this matter. After notifying the other board members, it came to light that three other board members are also members of the Tiverton Land Trust and if they recused themselves, this matter could not be heard due to the quorum not being met.

Mr. Taylor further explained that he and the other three members went for an advisory opinion from the Ethics Commission. The Ethics Commission ruled that none of the members are what is defined as a business associate and they are not on the board of directors. This decision was upheld by the Rhode Island Ethics Commission and they issued a draft advisory opinion that there was really no legal conflict that would prohibit this Board from hearing this petition. Mr. Taylor offered the seven page decision to anyone who wished to read it.

Mr. Lafazia asked the Chairman to inquire if anybody present had an objection. The Chairman asked if anybody present objected to any of these four members sitting on the board under these circumstances and nobody indicated that they had an objection. At this point, the Chairman asked the four members who were Mr. Lafazia, Ms. Gescheidt, Mr. Taylor and Ms. Krumholz if they had concerns and would sit on this petition and each member answered in the affirmative that they would sit on this petition.

The Chairman asked Mr. Stetson Eddy, the attorney representing this petitioner to proceed. Mr. Eddy presented Terry Holland as a real estate expert to testify on this matter. The Board accepted Ms. Holland as an expert in real estate. Ms. Holland gave testimony and stated that this farmer's market will be seasonal in nature and will be run during the summer and probably early fall. Mr. Eddy asked Ms. Holland if this site is ideally situated for a farmer's market and Ms. Holland answered in the affirmative. Ms. Holland went on to give her opinion that this proposed farmer's market would not create a nuisance or hazard in the area and the granting of relief will not alter the character of this neighborhood.

The Chairman asked Ms. Holland if she believed this is consistent with the surrounding uses and Ms. Holland answered in the affirmative. Ms. Gescheidt asked Ms. Holland whether or not there were any traffic studies done and Ms. Holland responded she did not know. Ms. Gescheidt went on to ask Ms. Holland if there is adequate parking on the premises and Ms. Holland responded there is plenty of parking. At this point the Chairman asked if anyone in the audience had a question for Ms. Holland. The following questions were asked (1) if there will be any structures that will need to be built on the property, (2) if there will be port-a-johns on the property for which a permit will have to be acquired, (3) will these structures become permanent and (4) if this is a zoning variance, does that mean it applies only to this specific use and to no other and that the entire parcel as a whole would still be considered zoned opened space.

The Chairman answered the question regarding open space and stated the area is zoned opened space and the petitioner is requesting to use a portion of that land for retail sales but that does not change the use of the property it will still be open space. Mr. Eddy answered the question regarding if any structures were being built and stated there will not be any buildings constructed. Mr. Eddy also answered no port-a-johns are planned. Another audience member asked the question regarding business hours and Mr. Eddy responded the farmer's market will be open on Saturdays from 9 a.m. to 1 p.m. rain or shine and the farmers are requested to be there to set up at 8:30 in the morning.

Mr. Eddy presented Diana Toste of 543 Eight Rod Way, Tiverton and a member of the Tiverton Recreational Committee as a witness. Ms. Toste was sworn in and gave testimony. Mr. Eddy showed Ms. Toste a site map and asked her to explain this map to the Board. Ms. Toste explained 25 is the maximum number of spaces allowed and the configuration of each space is 10 x 10 with canopies. Ms. Toste also explained that a consignment space will be available for homeowners who wished to sell product and the community service kids from Tiverton High School will be there to help them. Mr. Eddy asked Ms. Toste if any parking will be allowed on Main Road and Ms. Toste answered, no, that if someone did park on the Main Road, they would be kindly asked to move their vehicle into the designated parking area.

Ms. Toste went on to explain the application of the rules and regulations that have been drawn up for the vendors. Mr. Eddy asked Ms. Toste what type of products will be available to the public and Ms. Toste responded fresh produce, flowers, plants, herbs, eggs, organic beef, organic pork, lobsters, oysters, pies, pastries, bread, cheese and preserves. Mr. Lafazia asked Ms. Toste what provisions have been made for regulating traffic going on and off Main Road into the parking lot and Ms. Toste answered Connie Lima contacted Lieutenant Jones of the Tiverton Police Department and discussed it with him and he didn't feel there were any concerns. Ms. Toste went on to say Lieutenant Jones would have someone drive by periodically.

The Board went into executive session to discuss this matter. Ms. Krumholz stated the Board should be very specific about the boundaries of the variance granted. Ms. Gescheidt stated the Board should probably confine it to agricultural, seafood and floral products so people aren't selling household items. Mr. Taylor stated the amount of space should be limited to thirty 10 x 10 stalls and Ms. Krumholz stated if it exceeds that amount, they have to come back before the Board. Ms. Krumholz made a motion to

grant this petition that it be limited to the selling of agricultural produce, flowers, seafood, eggs, meat and cheese, that it be limited to Saturdays between the hours of 8 to 6 and the canopies go away, the trash is cleaned up and if there are any problems with traffic on the Main Road that they have to do something about it based on the evaluation by the chief of police and granting this variance will not be contrary to public interest, that the granting will not alter the character of the surrounding area and that there's no evidence that it would have any sort of negative impact on the town. Mr. Taylor seconded. The vote was unanimous. Voting were: Chairman David Collins, Ms. Gescheidt, Mr. Taylor, Ms. Krumholz and Mr. Jackson.

3. A petition has been filed by Antoine Karam of 1420 Main Road, Tiverton, RI requesting a variance to Article VI Section 3.b. and Section 2.d. of the Tiverton Zoning Ordinance in order to construct a tennis court with portions of it surrounded by a 10 foot high fence in the side yard whereby the location is not allowed and exceeding fence height and a variance to Article V Section 1 in order to maintain an enclosure over an existing stairway to the roof exceeding maximum height at 1420 Main Road, Tiverton, RI being Map 1-11 Block 92 Card 24 on Tiverton Tax Assessor's maps in a R40 zone.

DECISION: Mr. Karam was sworn in and explained his request to the Board and stated he would like to construct a tennis court on the side of the house. The house is set back quite a bit from the Main Road and there is not much space behind the house and the only location for the tennis court is on the side yard. Mr. Karam explained the height issue of the fence and stated the fence is intended to keep the balls in the court because the house is on a hill and every time a ball is hit, it probably will go down into the Main Road.

The Chairman asked Mr. Karam to explain the issue regarding the enclosure over an existing stairway to the roof exceeding the maximum height. Mr. Karam went on to say when the property was purchased almost a year ago and there was a bulkhead on top of the widow's walk on top of the house, that bulkhead when there was torrential rains would pour inside of the house. So the bulkhead was ripped out in kind of an emergency to prevent rain from coming in the way it did and Mr. Karam constructed that little opening with a slight little roof to keep the rain draining away from the inside of the house. Mr. Karam further explained the house was built in 1860 something and the height of the widow's walk is already above 35 feet but after the house was built, there was some issues with height above 35 feet and this structure goes to 41 and-a-half feet from the ground.

The Chairman asked Mr. Karam if this construction was done on a building permit and Mr. Karam answered, no, it was done on an emergency basis when there was enormous rain and the bulkhead blew out and water was coming in. The Chairman asked Mr. Karam if there were stairs covering over the stairway before and Mr. Karam replied the stairs were already there and he just modified it and just put a little slant on the roof and raised it about four or five feet.

The Building Official, Gareth Eames, was sworn in and stated building height is determined from the average grade of the front of the house and the plans Mr. Karam submitted, the grade has been measured on the side of the house. Mr. Eames

presented the Board with some photographs he took which shows the profile with the front of the house to the right. The photograph was entered as an exhibit. Mr. Eames commented that in looking at the photographs it's hard for him to think of the work that went into this enclosure as being an emergency response to some leakage. Normally that would be in the form of some tarps or something to get by until repairs can be made to the existing structure. Mr. Taylor asked what the new height is and Mr. Eames replied 47.5 by his calculations. Ms. Gescheidt asked what the height requirement is and Mr. Eames replied restriction is 35 feet. Mr. Karam stated the house was already above that. Mr. Eames stated it was an existing dimensional nonconforming and from his calculations before he added this construction, it was 39 feet. Mr. Karam stated if you subtract what was there, it's about five feet additional height.

Ms. Krumholz asked Mr. Karam why a 7 foot fence would not be sufficient which is the required height and Mr. Karam responded that according to the tennis contractor, the standard is 10 feet. Ms. Gescheidt asked if Mr. Karam was encroaching on any set back or side yard requirements by adding this tennis court and Mr. Karam replied he also owns the property behind his house. Mr. Karam once again informed the Board because his house is on a hill, his concern is that the tennis balls would be rolling down the hill into the Main Road. Ms. Krumholz asked Mr. Karam to describe the fencing and Mr. Karam explained it was black rubberized which is the least noticeable. The Chairman asked Mr. Karam if any of the neighbors have complained and Mr. Karam replied no, that the neighbors are very supportive.

The Board went into executive session to discuss this matter. Mr. Taylor stated he didn't have a problem with the tennis court, however, he does have a problem with people building things without a building permit. Mr. Taylor also stated Mr. Karam could have used a tarp temporarily and then pulled a building permit. Ms. Gescheidt stated she was troubled by the addition because there was no application but on the other hand she did not think it is offensive and to ask Mr. Karam to knock it down seems a little extreme. Mr. Jackson stated he is also troubled that this structure went up without the proper application. The Chairman asked Mr. Ruggiero if the Board allows the structure on the roof would Mr. Karam then have to get a building permit. Mr. Karam stated he already has and has paid a penalty. Mr. Ruggiero reminded Mr. Karam that he cannot offer any testimony while the Board is in executive session.

Mr. Lafazia suggested the Board vote on these issues one at a time. Ms. Gescheidt made a motion to grant the variance of both the addition of the tennis court and the variance of the height requirement for the fence based on the fact that it's the most logical place to put it on the property, that special conditions exist that are peculiar to the land that are not due to any kind of physical or economic disability of the applicant, that the relief is not contrary to the public interest and doesn't alter the general character of the land and that it's the least variance from the provision to allow him to put the tennis court up in that location. Ms. Krumholz seconded. The vote was unanimous. Voting were: Chairman David Collins, Ms. Gescheidt, Mr. Jackson, Mr. Taylor and Ms. Krumholz.

Ms. Gescheidt made a motion to grant the variance to maintain the enclosure over an existing stairway to the roof exceeding the maximum height with a finding that the

addition was motivated by an emergency condition of him to replace a leaking bulkhead, that the relief is not contrary to the public interest and that it would be an unnecessarily hardship at this point for the applicant to take the structure down, that it doesn't seem to alter the general character of the area, that no abutters have complained about it and that it's the least amount of variance to grant to afford him this relief. Mr. Jackson seconded. The vote was four to one. Voting in favor were: Chairman David Collins, Ms. Gescheidt, Mr. Jackson and Ms. Krumholz. Opposed, Mr. Taylor. The motion carried.

4. A petition has been filed by Tiverton CVS, Inc., as the applicant, requesting a special use from Article IV of the Tiverton Zoning Ordinance in order to construct a drive-through service for pharmacy use at 500 Main Road, Tiverton, RI being Map 2-12 Block 194 Card 1B on Tiverton Tax Assessor's maps and located in a General Commercial zoning district.

**** Chairman David Collins stated this petition will not be heard because of some issues with changes in plans and also possible conflict of interest with some of the board members so this matter will be continued until the next meeting which is August 6th.

5. A petition has been filed by Tiverton CVS, Inc., as the applicant, requesting a variances from Article XII, Section 4 of the Tiverton Zoning Ordinance in order to erect a pylon sign exceeding area and height, erect more than two attached signs exceeding area and to exceed the number of free standing signs located at 500 and 520 Main Road, Tiverton, RI being Map 2-13 Block 194 Card 1B and Block 94 Card 94A on Tiverton Tax Assessor's maps allowed in General Commercial zoning district.

**** Chairman David Collins stated this petition will not be heard because of some issues with changes in plans and also possible conflict of interest with some of the board members so this matter will be continued until the next meeting which is August 6th.

6. The Zoning Board will convene as the Planning Board of Appeals to hear the petition of James McInnis Trustee of the Tiverton Associates Trust.

**** Chairman David Collins stated the Zoning Board of Review was supposed to sit tonight as the Planning Board of Appeals on this petition, however, this matter has to be continued based on the fact that the Board has a special legal representative who is not available tonight so this petition has been continued until the next meeting which is August 6th.

ADMINISTRATIVE ISSUES:

A date was selected for a workshop. The date selected and agreed upon was Monday, August, 18th at 7:30 in the Town Hall. Mr. Ruggiero stated he will work with Jodi and put together an agenda and if any of the Board Members have additional matters, to email them to Jodi.

The Chairman reminded the Board there were elections. Mr. Taylor nominated Mr. Jackson to sit as Chair and Mr. Jackson declined and stated he would rather sit as the Vice Chair. Ms. Gescheidt nominated David Collins as the Chair. The vote was unanimous. Voting were: Mr. Collins, Mr. Lafazia, Ms. Gescheidt, Ms. Krumholz, Mr. Jackson and Mr. Taylor.

Mr. Jackson was nominated as the Vice Chair and Mr. Taylor seconded. The Vote was unanimous. Voting were: Mr. Collins, Mr. Lafazia, Ms. Gescheidt, Ms. Krumholz, Mr. Jackson and Mr. Taylor.

Mr. Taylor was nominated as secretary. Ms. Krumholz seconded. The vote was unanimous. Voting were: Mr. Collins, Mr. Lafazia, Ms. Gescheidt, Ms. Krumholz, Mr. Jackson and Mr. Taylor.

Mr. Taylor made a motion to accept the minutes of the last meeting as written. Mr. Jackson seconded. The vote was unanimous. Voting were: Mr. Collins, Mr. Lafazia, Ms. Gescheidt, Ms. Krumholz, Mr. Jackson and Mr. Taylor.

Ms. Krumholz made a motion to adjourn. The vote was unanimous. Voting were: Mr. Collins, Mr. Lafazia, Ms. Gescheidt, Ms. Krumholz, Mr. Jackson and Mr. Taylor.

(Whereupon the Zoning Board of Review meeting ended at 10:52 p.m.)

ZBR/ssf

C E R T I F I C A T E

I, Salvina S. Ferreira, Registered Professional Reporter, hereby certify that the foregoing pages, 1 – 9, in the matter of Zoning Board of Review Minutes held on Wednesday, July 2, 2008 are transcribed to the best of my knowledge, skill and ability.

I further certify that I am not interested in the event of the action.

IN WITNESS WHEREOF, I have hereunto subscribed my hand and affixed my seal of office this 29th day of July, 2008.

Salvina S. Ferreira, RPR

My commission expires: September 26, 2009.

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